JUDICIAL DECISIONS ON CRIMINAL LAW AND PROCEDURE.

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ILLEGAL SEIZURE OR SEARCH.

Calhoun v. State, Ga., 87 S. E. 893; *Smith v. State,* Ga. App, 87 S. E. 713. *Admissibility of evidence thus obtained.*

Calhoun v. State involves an interesting point on the admission of evidence. The Supreme Court of Georgia holds in this case that articles taken from the person of the accused by one who has illegally arrested him are admissible in evidence against him, and that this does not violate the constitutional provision that "no person shall be compelled, in any criminal case, to be a witness against himself." The decision is based on the Court's finding that, in admitting evidence so obtained, the accused is not compelled to do any act incriminating himself. The criterion as laid down by the Court is, "Who furnished the evidentiary facts connecting defendant with the crime?"

Smith v. State holds the admission of evidence obtained by an illegal search of premises of the accused is not error and not a violation of the Fourth Amendment which guaranties against unreasonable searches and seizures.

There is apparently considerable conflict in state decisions on the points involved in the two cases above cited, but a careful examination and comparison of the cases show that the rule as laid down above is quite generally followed.

While this is looked on as the general rule, it should be noted that some courts go to the extent of saying "the court will not take notice of whom the evidence was obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." Other courts limit the rule so as to bar admission of evidence obtained by search under a warrant that was not lawfully issued for some purpose. So, in *State v. Sheridan,* 121 Iowa, 164, evidence is held to have been improperly admitted because it was found by use of a search warrant which had no legal purpose whatever, but was issued solely to obtain testimony against the accused.

Boyd v. U. S., 116 U. S. 616, was looked on as a leading case for a number of years. It holds that "search and seizure of a man's private papers (invoices, etc.) to be used in evidence for the purpose of convicting him of a crime, or requiring a penalty or forfeiture of his property, is totally different from search and seizure of stolen goods, dutiable articles on which duties have not been paid, and the like, which rightfully belong to custody of the law." In accordance with this distinction the case holds that private papers unlawfully taken from a man's possession are not proper evidence against him, and to admit them would violate the Fourth and Fifth Amendments of the Constitution.

A later U. S. case, *Adams v. N. Y.,* 192 U. S. 585, attempts to distinguish rather than overrule *Boyd v. U. S.,* but itself stands for the proposition that "private papers of defendant found in search made under a legal warrant for the search of gaming paraphernalia, are properly admissible in evidence against the owner who is on trial."

Some state courts have recognized the distinction made in *Boyd v. U. S.* between private papers and articles, but the majority seem to be in accord with *Adam v. N. Y.* in making no distinction.

In summing up the authorities on the point, it may be said that, if the person or belongings of the accused are searched by another, although without vestige of authority, the evidence thus discovered may be used against him (*Gundrat v. People,* 138 Ill. 103, and *State v. Griswold,* 67 Conn. 290); and if a warrant is legally issued for some purpose, evidence found incidentally is admissible (*Adams v. New York,* 192 U. S. 585); if a warrant was illegally issued for the sole purpose of securing evidence against the accused it's admissibility would be questioned in some courts (*State v. Sheridan,* 121 Iowa, 164), but admitted without question in others.

In connection with this point it is interesting to note that, if articles introduced in evidence in a criminal prosecution were taken by officers offering them without authority, they may be forced to respond in damages. *Starchman v. State,* 62 Ark. 538; *Williams v. State,* 100 Ga. 511. *Commonwealth v. Tibbetts,* 157 Mass. 519. It is also generally held that evidence discovered by aid of an inadmissible confession is admissible.—F. T. McGill, Iowa City, Ia.

SUSPENDED SENTENCE.

State v. Sharp, La., 70 So. 573. *No appeal.* In this case the Supreme Court of Louisiana held that a defendant convicted of violating a police jury ordinance, upon whom sentence was suspended, was not entitled to an appeal, on the ground that there had been no final judgment, and, therefore, no appeal would lie. However, in this particular case, there was a statute (Act No. 74 of 1914) relative to the suspension of sentence, which expressly provided that, if sentence is suspended, neither the verdict of conviction nor the judgment entered thereon shall become final, except upon the conviction of the defendant of another felony or misdemeanor.

Whether or not the holding of the court in the absence of this act would have been the same, depends upon the question whether or not the suspension of sentence is to be considered a final judgment. It is clear that if it is not so considered, an appeal therefrom will be dismissed on the ground of being premature. *State v. Fleming,* 13 Iowa, 443; *Hill v. The State,* 41 Texas, 253; *State v. Sheshane,* 25 Mo. 565. The principal difficulty is that the terms "Suspended Sentence" and "Suspension of Sentence" are easily confused, and one must look at the facts of the particular case to ascertain whether or not the defendant in question had his sentence suspended or received a suspended sentence. The term "suspended sentence," as used in criminal law, refers to the suspension of the execution of a sentence already imposed and not correctly to the suspending of the sentence. *State v. Osborne,* 79 N. J. Eq., 430, 82 Atl. 424, 428. In the course of his opinion in this case, last cited, Garrison, V. C., goes deeply into the discussion of the difference existing and difficulty arising in the use of these terms, and also makes a thorough examination of the power of the courts in the matter of suspending sentence. An excerpt of his opinion follows: "The term 'suspending sentence' has been indiscriminately applied by many courts in two entirely different situations. In one use, it has been applied to cases where the court did not impose any sentence whatever, but suspended the pronouncing of the sentence; and it has been also applied to cases where a

sentence has been pronounced, but the court has suspended the operation or execution of sentence."

The opinion also contains a very good collection of cases which uphold or deny the power of the court to suspend the pronouncing of the sentence, or the suspension of the operation of the sentence in the various jurisdictions, in the absence of legislation. Although there is not much in the books about this, the English reports show that the courts of criminal jurisdiction exercised the power of delaying the imposition of a sentence for various reasons and of delaying the operation of an imposed sentence and did not do this by virtue of any statute, and, therefore, must have inherently had the power so to do. *State v. Osborne,* 79 N. J. Eq. 430. Whether or not this power will be exercised in the courts of this country depends upon the rule in the particular jurisdiction. After this has been discovered it is also necessary to determine what the court has actually done—that is, suspended imposing the sentence or given the sentence but suspended its execution. In those jurisdictions where the former rule is law, and the trial court has as yet not pronounced the sentence, the courts would probably hold that an appeal therefrom without any showing of objection to such suspension would be premature. Certain it is that there has been no final judgment in such case.

However, if the defendant after conviction does not wish to have the pronouncing of his sentence suspended, he may object, and this would undoubtedly result in the trial court not attempting to exercise its jurisdiction, since, as an original proposition, such a suspension is nothing but beneficial to the defendant, and should he object to receiving this benefit, the court would no doubt fail to accommodate him by yielding to his objection, thereby also relieving him of the benefit he would otherwise have enjoyed. The only possible objection he could have, would be the undesirability of remaining in the indeterminate position resulting from a suspension of the pronouncement of judgment; but this, too, is within his control, since the convicted defendant, if the facts were such as to make it an unreasonable suspension, could compel the proper court, by mandamus, to pronounce judgment.

After such judgment was pronounced it would undoubtedly be final in the sense that an appeal founded thereon would not be premature, even though the rule in that jurisdiction happened to be that the court had power to suspend the execution of the sentence after it had been given. This, however, is the minority rule. *Miller v. Evans,* 88 N. W. 198. In the majority of the jurisdictions the rule is that after sentence has once been pronounced there can be no suspension of its execution, and it is clear that in such cases the judgment is final and may be appealed from.

It will be seen then that, although the rules in the various jurisdictions differ, the matter of appeal is almost wholly within the determination of the defendant. True, it may be more difficult for one convicted to get an appeal where the pronouncement of his sentence has been suspended (granting the court in that particular jurisdiction has power to do so), since he must take other steps to have the final judgment or sentence rendered if the court refuses to impose it when he objects to its suspension. Still there is a resulting benefit to the defendant in the vast majority of cases which is so great that the instances are very few when such a step would be taken. After all, it is simply a matter of taking any of the necessary steps to make the court impose the

sentence which has been suspended, and then, after having a final judgment, carrying on the appeal when it will not be vulnerable to the objection that it is premature.—H. J. Ries, Iowa City, Ia.

PRIVATE COUNSEL RETAINED TO ASSIST IN PROSECUTION.

Rock v. Eckern, Wis., 156 N. W. 197. *Contrary to public policy.* The Supreme Court of Wisconsin in this case reiterates what seems to be a rule common only to its own and Michigan jurisdictions; viz., that a contract with the complaining witness in a prosecution, whereby an attorney agreed to assist the district attorney, is void as against public policy, and no recovery can be had, although the accused, the court, and the district attorney acquiesced in the prosecution according to the contract.

All contracts which are repugnant to justice or founded on an immoral consideration, or against the policy of common law, or contrary to statute, are void. *Melchoir v. McCarty,* 31 Wis. 252.

Under the English practice, at the time of the Revolution, prosecution by private parties was the rule rather than the exception, there being no public prosecutor who had general charge of criminal business. Under our modern statutes providing for public prosecutors the practice has quite generally continued, and only in a few cases has it been questioned.

In *Rounds et al. v. State,* 57 Wis. 45, the court overruled an objection by defendant to counsel assisting the district attorney, the latter being present and not objecting. Earlier and later decisions in Wisconsin and Michigan are contra. *People v. Hurst,* 1 N. W. 1027; *Austin v. Supervisors of Milwaukee County,* 24 Wis. 278; *Buckley v. Schwartz,* 83 Wis. 304; *Smeed v. People,* 38 Mich. 248. These cases lay down the doctrine that the duty of prosecuting is on the public prosecutor, that he is a public officer and that to allow assistants privately hired would be in effect to allow him compensation outside of that fixed by law; that his duty is to protect the innocent as well as to convict the guilty, and that an assistant privately hired would sacrifice justice to the pride of professional success.

Many cases say there is no ground for objection to privately hired or appointed assistants to the prosecutor. *State v. Bartlett,* 55 Maine, 200; *Kansas v. Wilson,* 24 Kan. 189; *Griffin v. State,* 15 Ga. 476; *Burckhard v. State,* 18 Texas Appeal, 599; *Wood v. State,* 92 Ind. 269; *Commonwealth v. King,* 8 Gray, 501.

If the appearance of privately hired assistants is against public policy, it must be because the prosecuting attorney, and not the court, has the power to insure justice, and it would seem the one directly affected should be entitled to the rule in favor of the general public. If repugnant to the idea of a prosecution by the one officially elected and qualified under the statute, an appointment of an assistant by the court does not overcome this objection; it would seem since the court can appoint and since the appointee would not be an officer, and since he is entitled to compensation even where the statute is silent, that the legislative intent was not to change the previous practice, but to insure action; if there is virtue in the power of appointment, acquiescence should amount to such an exercise of that power.

The extension of the public policy doctrine should be carefully guarded. The power to contract should be left unrestrained as far as possible; the public injury should be free from doubt.

The Wisconsin and Michigan doctrine ignores the technicalities built about

a criminal prosecution that in themselves are intended to absolutely assure justice—the rules of procedure are not varied by the fact that an assistant appears in the prosecution.

Michigan and Wisconsin both recognize the validity of a reward contract for arrest and conviction; most jurisdictions have questioned the policy of these, at one time or another, on the ground that they tend to perjury. Public policy does forbid that anything should be accomplished by means of an offer of reward which cannot be accomplished by means of a contract.

The doctrine of the Michigan and Wisconsin cases is not supported by the early cases cited by the court. *Commonwealth v. Gibbs,* 4 Gray 146; *Commonwealth v. King,* 8 Gray, 501; *Hite v. State,* 9 Yerg. 198; *Jarnagin v. State,* 10 Yerg, 529.—A. H. Bolton, Iowa City, Iowa.

APPEAL.

People v. Bertlini, 157 N. Y. Supp. 599. *Technical error.* On appeal from a conviction of robbery, the issue for the court is, not whether the defendant is guilty, but whether he was adjudged guilty after trial in substantial conformity to law.

Admission of improper evidence as to identification of defendent, held such error as to require reversal, in spite of Code Crim. Proc., Sec. 542, providing that on appeal the court must give judgment without regard to technical errors, which do not affect the substantial rights of the parties.

The decision of the court on appeal from a conviction cannot be affected by the fact that it would, even without improper proof excluded, reach the conclusion reached by the jury.

BURGLARY.

People v. Toland, N. Y., 111 N. E. 760. *Meaning of "break."* Penal law, Sec. 404, sub. 2, provides that a person who, being in a building, commits a crime therein and breaks out of the building, is guilty of burglary in the third degree. Defendant and others entered a barn through an open doorway, closed and fastened the door with a hook or strap sufficiently to prevent egress unless the fastening were removed, and, after killing a heifer therein, stole the meat, unfastened the door and left the barn. Held, that this was such a breaking out as was within the statute, as the door was an obstacle to egress as though closely shut and firmly latched, and the word "break" in the statute is used in the sense of the removal of impediments to passage, and it was immaterial that the door was closed by defendant and his companions, and that in opening it they were restoring it to the condition in which they found it.

CARRIERS.

Illinois Central R. Co. v. Messina, 36 Sup. Ct. Reptr. 368. *Riding free with employee's consent.* Riding upon the tender of an interstate train by permission of the engineer without payment of fare is made unlawful by the act of Feb. 4, 1887, Sec. 1, as amended by act June 29, 1906, under which any common carrier violating the provisions of that statute against free transportation is guilty of a misdemeanor and subject to a penalty, and any other person other than those excepted, who uses such interstate free trasportation, is made subject to a like penalty. Hughes, J., dissenting.

CONSTITUTIONAL LAW.

Tanner, Atty. Gen. of the State of Washington, v. Little, 36 Sup. Ct. Reptr. 379. *Sales with trading stamps or coupons. Equal protection of the laws.*

Impairing contract obligations. The imposition under Wash. Laws 1913, Chap. 134, of an annual license tax of $6,000 upon merchants using stamps, tickets, or coupons redeemable in cash or merchandise, is not repugnant to the equal protection of the laws clause of the U. S. Const., 14th Amend., as an attempted arbitrary classification, whether such stamps are prepared or redeemed by the merchant issuing them or by a third party with whom the merchant has a contract for their use. Nor does it impair the contract obligations of such merchants with their customers or with third parties with whom they have contracted for the use of such stamps or coupons.

Butler v. Perry, Sheriff of Columbia County, Florida, 36 Sup. Ct. Reptr. 258. *Involuntary servitude. Conscripted labor on highway.* Involuntary servitude is not imposed, contrary to U. S. Cont., 13th Amend., by the provision of the Florida Laws 1913, Chap. 6537, Secs. 10, 12, making it a misdemeanor punishable by fine or imprisonment for any able-bodied male person between the ages of twenty-one and forty-five years to fail in any year to perform six days labor on the highways of his county, when summoned, or to provide an able-bodied substitute, or, in lieu thereof, pay $3 to the road overseer.

EXTRADITION.

Innes v. Tobin, Sheriff of Bexar County, Texas, 36 Sup. Ct. Reptr. 290. *Exclusiveness of Federal power.* The governor of Oregon honored a requisition made by the governor of Texas for the delivery of the plaintiff in error for removal to Texas as a fugitive from justice of that state. The accused was taken to Texas, tried for murder and acquitted. She was not released from custody, however, because ordered held by the governor of Texas under a requisition of the governor of Georgia.

Held, the failure of Congress when enacting the interstate extradition provisions of U. S. Rev. Stat., Sec. 5278, Comp. Stat. 1913, Sec. 10126, to provide for the case of a fugitive from justice who has not fled into the state where he is found, but was brought into it involuntarily by a requisition from another state, does not take the matters within the unprovided area out of possible state action, but leaves the state free to deliver the accused to any state from whose justice he has fled.

GRAND JURY.

Wilson v. U. S., 229 Fed. 344. *Presence of stenographer in grand jury room.* The presence in the grand jury room of a stenographer, who merely recorded the testimony as it was given and did not attend at the deliberations of the grand jury, did not invalidate an indictment, especially where such stenographer was a regular clerk and assistant to the district attorney, appointed by the attorney general to an office with prescribed duties and fixed tenure, and who had taken the oath required from all government officials. "Apparently there have been different answers to this question in different districts; but in this circuit (the second) for upwards of sixty years it has been uniformly held that the presence of a proper shorthand reporter, who merely recorded the testimony as it was given and did not attend at the deliberations of the grand jury did not invalidate an indictment."

NARCOTIC DRUGS.

U. S. v. Curtis, 229 Fed. 288. *Extent of protection to sales under prescription under Harrison Narcotic Law.* Harrison Narcotic Law (Act Dec. 17, 1914,

c. 1) provides, relative to opium or cocoa leaves, or any compound or preparation thereof, that it shall be unlawful to sell any of the drugs, except in pursuance of a written order of the person to whom the article is sold, but nothing therein contained shall apply to the distribution of any of such drugs to a patient by a physician registered thereunder in the course of his practice, provided that such physician shall keep a record of all such drugs dispensed, nor to the sale of any of such drugs by a dealer to a consumer under a written prescription issued by a physician registered thereunder. Held, that a physician who issues a prescription for an unusually large amount of the drugs, which prescription shows on its face that the quantity prescribed is unusual and unreasonable, is guilty of an offense, unless the prescription indicates the necessity for such an unusual quantity.

SELF-INCRIMINATION.

U. S. v. Lombardo, 228 Fed. 980. *Constitutionality of Sec. 6, White Slave Traffic Act.* White Slave Traffic Act, Sec. 6 (Comp. Stat. 1913, Sec. 8817), requires that every person keeping an alien woman or girl in any house or place for purposes of prostitution, or for any other immoral purpose, to file with the Commissioner General of Immigration a statement in writing setting forth certain facts, and provides that any such person failing to file such statement shall be guilty of a misdeameanor; that no person shall be excused from furnishing the statement on the ground that it might tend to incriminate him, but that no person shall be prosecuted "under any law of the United States" on account of anything truthfully reported in such statement. Rem. & Bal. Code Wash., Secs. 2440, 2688, make it an offense to keep a house of prostitution, or to place a female therein with intent that she shall live a life of prostitution,

Held, that Sec. 6 violates Const. U. S., Amend. 5, providing that a party shall not be compelled in any criminal case to be a witness against himself, as a party harboring an alien for the purposes of prostitution is thereby required to furnish evidence which could be used against him in a prosecution for violation of the state laws.